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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEB 7 1997

In the Matter of	)	
	)	IB Docket No. 96-261
International Settlement Rates	)	

To: The Commission

COMMENTS OF TELECOMUNICACIONES INTERNACIONALES DE ARGENTINA TELINTAR S.A.

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SUMMARY

Telecomunicaciones Internacionales de Argentina Telintar S.A. ("Telintar") strongly opposes the unprecedented and unlawful proposals made by the FCC. In the Notice, the FCC proposes to unilaterally establish accounting rates. If foreign carriers do not promptly acquiesce, the agency further proposes to direct U.S. carriers to breach their effective accounting rate agreements and make settlements payments at FCC-specified rates.

Telintar, like most carriers throughout the world, shares the FCC's desire to move towards more cost-oriented accounting rates, and is taking concrete actions to do so. However, Telintar will not be dictated to by the FCC, which lacks jurisdiction to impose its policies on carriers outside the United States. Consequently, if the FCC directs U.S. carriers to breach their accounting rate agreements, Telintar reserves the right to exercise any or all of its contractual remedies.

The FCC's proposals violate the binding regulations of the ITU Treaty. Both Articles 1.5 and 6.2.1 of the ITU Regulations state that the provision of international telecommunications services between countries must be conducted pursuant to mutual agreement. The FCC's proposals, however, would require U.S. carriers to settle traffic with foreign carriers at accounting rates unilaterally imposed by the FCC, rather than the rates embodied in their mutually accepted accounting rate agreements.

The FCC repeatedly relies on ITU Recommendation D.140 -- which states that "accounting rates for international telephone service should be cost-orientated" -- to justify its proposals. Recommendation D.140, however, is not a legally binding requirement. Furthermore, the FCC ignores the fact that Recommendation D.140 does not endorse the

incremental cost approach proposed in the Notice. Rather, the Recommendation expressly acknowledges the importance of considering a variety of factors -- including the level of network development -- in establishing accounting rates that are "orientated" towards cost. Recommendation D.140 also recognizes that countries at different levels of economic development are likely to have different cost structures.

The FCC recognizes that any GBT Agreement is likely to include Most Favored Nation ("MFN") obligations. The FCC's proposal to take "enforcement action" against individual carriers that fail to make "meaningful progress" in lowering their accounting rates, however, would give the FCC unbridled discretion to retaliate against one country but not against another country. Such arbitrary retaliation would constitute illegal discrimination under MFN.

Nothing in the Communications Act authorizes the FCC to prescribe international accounting rates or to require U.S. carriers to breach the terms of accounting rate agreements. Sections 4(i) and 303(r) allow the FCC to take those actions "not inconsistent with this Act, as may be necessary in the execution of its functions." Although these provisions have been construed broadly, U.S. courts have emphasized that the FCC's authority under these provisions is not infinitely elastic. The Supreme Court has specifically ruled that Section 303(r) does not give the FCC authority to direct an entity subject to its jurisdiction to breach a contractual agreement it has entered into with a third party. In addition, Sections 201-205 of the Communications Act apply to rates charged by U.S. carriers to their domestic customers; they do not provide the FCC with any authority to regulate the prices paid by U.S. carriers to their foreign correspondents.

The experience in Argentina demonstrates the shortcomings of the FCC's proposed approach. The Government of Argentina is committed to the liberalization of the telecommunications sector. Argentina privatized the sector in 1990, and is to open it to full competition no later than the year 2001. Since 1992, the Argentina-U.S. accounting rate has been reduced on three separate occasions. As a result, the mutually accepted accounting rate has fallen by nearly 20 percent. Moreover, as a result of the recent approval of its fundamental tariff rebalancing proposal, Telintar is now in a position to enter into further negotiations with its U.S. correspondents.

The FCC's actions to date have exacerbated the traffic imbalance between Argentina and the United States. In particular, the FCC's encouragement of call back and call re-origination has significantly increased the traffic imbalance from the United States to Argentina. The FCC also has refused to approve agreements that Telintar has entered into with MCI, Sprint, and WorldCom that would have further lowered accounting rates. Instead, the agency has encouraged AT&T to unilaterally make settlements payments at discriminatory rates. Adoption of the FCC's proposals would worsen the existing situation by making it more difficult for U.S. carriers to enter into mutually beneficial accounting rate agreements, while further undermining Telintar's ability to rely on the commitments undertaken by its U.S. correspondents.

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INTRODUCTION

Telecomunicaciones Internacionales de Argentina Telintar S.A. ("Telintar") files these comments to express its strong opposition to the unprecedented and unlawful proposals made by the U.S. Federal Communications Commission ("FCC") in its recent Notice of Proposed Rulemaking.[1] As demonstrated below, these proposals exceed the FCC's jurisdiction and would violate both international and U.S. law.

I. THE FCC CANNOT IMPOSE ITS POLICIES ON THE REST OF THE WORLD

This proceeding represents an unprecedented effort by the FCC to impose its regulatory policies on governments and carriers throughout the world. The FCC's willingness

1 International Settlement Rates, Notice of Proposed Rulemaking, IB Docket No. 96-261, FCC 96-484 (rel. Dec. 19, 1996) ("Notice").

to press foreign carriers to lower accounting rates is well-known. The FCC's current proposals, however, mark a sharp break from prior practice. While it has previously established accounting rate "benchmarks," the agency has made clear that these "are only negotiating guidelines, not mandatory requirements."[2] In the present Notice, in contrast, the FCC acts as if it has the ability to establish binding accounting rates for carriers outside the United States, and may take punitive action against those carriers that do not promptly comply with its directives.

The FCC's high-handed approach permeates the language of the Notice. The agency states that it will establish new benchmarks, based on its estimate of the appropriate price, and will "require that settlements rates . . . be at or below [the] benchmarks" within a specified period of time.[3] If it subsequently determines that a carrier outside the United States has "failed to make meaningful progress toward complying with [its] benchmarks," the FCC threatens to take enforcement action against it.[4] Finally, the FCC warns that actions by foreign carriers that do not comply with its policies "will not be tolerated."[5]

In particular, the FCC asserts that it has the right to adopt total service long-run incremental cost as the standard for all international accounting rates and, if foreign carriers do not promptly adopt accounting rates based on this standard, to take "enforcement actions" against them. Such actions may include:

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2 Regulation of International Accounting Rates, Phase II, Order on Reconsideration, 11 FCC Rcd 6332, 6334 (1996).

3 Notice ¶ 63 (emphasis added).

4 Id. at ¶ 90 (emphasis added).

5 Id. (emphasis added).

- ordering U.S. carriers to breach their accounting rate agreements and, instead, to make settlements payments at a rate prescribed by the FCC;[6]

- retroactively prescribing the accounting rate between the U.S. and another country for prior periods, and demanding that carriers outside the United States refund revenues paid to them under the effective operating agreements in effect during those periods;[7] and

- ordering all U.S. carriers to engage in a group boycott of a non-U.S. carrier that exercises its contractual right to reduce service in response to non-payment by one of the U.S. carriers.[8]

Telintar shares the FCC's desire to move towards more cost-oriented accounting rates.[9] As the FCC seeks to develop appropriate policies in the accounting rate area, however, it must recognize two essential facts:

- First, the United States' "settlements deficit" is not simply the result of anti-competitive conduct by "foreign monopolists." To the contrary, policies adopted by the FCC -- particularly the encouragement of call-back and re-origination -- have significantly exacerbated the international traffic imbalance.

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6 Id. at ¶ 89. Such rates may be "at or below" the benchmark established by the FCC, rather than at the "negotiated rate." Id.

7 See id. at ¶ 90 n.84 (citing AT&T Corp., MCI Telecommunications Corp., Sprint, and LDDS Worldcom Petitions for Waiver of the International Settlements Policy to Change the Accounting Rates for Switched Voice Service with Peru, DA 96-696 (rel. May 7, 1996) and AT&T Corp. and MCI Telecommunications Corp., Petition for Waiver of the International Settlements Policy to Change the Accounting Rate for Switched Voice Service with Bolivia, DA 96-714 (Rel. May 7, 1996)).

8 See id. (citing AT&T Corp. Proposed Extension of Accounting Rate Arrangement for Switched Voice Service with Argentina, DA 96-378 (rel. Mar. 18, 1996) ("Telintar Order")).

9 As discussed in Section IV, infra, Telintar has made significant progress in lowering accounting rates and remains committed to continuing these efforts.

- Second, the FCC's jurisdiction does not extend beyond the borders of the United States. As a result, no reduction in international accounting rates is possible without bilateral agreements between U.S. carriers and their foreign correspondents.

A. FCC Policies Have Significantly Exacerbated the International Traffic Imbalance

The Notice is based on the premises that the United States' "settlements payment deficit" is the result of anti-competitive conduct by foreign monopolists, and that the FCC can eliminate this deficit by taking "enforcement action" against those carriers that decline to lower their accounting rates to the levels specified by the agency.[10] This simply is not correct. The most significant cause of the settlements deficit is the fact that the United States is a highly developed industrial nation, whose corporate and private citizens (including a large number of immigrants) make far more calls to other countries than they receive from those countries. No reduction in accounting rates is likely to alter this reality.[11]

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10 See Notice ¶ 23.

11 Paradoxically, efforts to force down accounting rates actually could increase the traffic imbalance between the United States and the rest of the world. The Notice suggests that reducing accounting rates would "increase revenues for U.S. foreign carriers" by stimulating demand for international services. Notice ¶ 10 (emphasis added). We leave it to the FCC to judge whether the "Laffer Curve" is applicable to the U.S. telecommunications market. Whatever effects accounting rate reductions may have on U.S. demand, however, the FCC provides no reason to believe that elasticities of demand are constant across all cultures and levels of economic development. To the contrary, it is reasonable to expect that demand for telecommunications service would be significantly less price-elastic in countries with lower levels of economic development. Therefore, decreasing accounting rates may increase the traffic imbalance between the United States and the rest of the world by stimulating U.S. demand to a far greater extent than demand in other countries.

The FCC also must recognize that its own policies have contributed to the settlements deficit.[12] The Notice provides concrete evidence that the growth of international call-back has significantly increased the international traffic imbalance.[13] As a result of call-back, traffic that would have resulted in settlements payments being made to carriers in the United States instead generate settlements payments from carriers in the United States. Third-country calling, which the FCC also has fostered, has had an even more significant effect: use of this call-back configuration results in U.S. carriers making two settlements payments in order to "patch together" a call from one non-U.S. country to another. The Notice utterly fails to acknowledge that these adverse consequences are the direct result of FCC efforts to promote call-back.[14]

The FCC also has permitted U.S. carriers to engage in call re-origination. This practice allows a carrier to route traffic from one non-U.S. country to another non-U.S. country through the United States. As a result of re-origination, a call that would have completely

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12 During the last decade, the traffic imbalance between the United States and the rest of the world has increased. This growth of the imbalance has occurred in three distinct phases. Between 1985 and 1987, the traffic imbalance grew by 10.2 percent per year. This growth presumably reflected the significant increase in U.S. outbound international traffic in the years immediately following the AT&T divestiture and the establishment of competition in the U.S. international market. Between 1988 and 1992, the growth of the traffic imbalance slowed to approximately 2.5 percent per year. Beginning in 1993, however, the growth of the traffic imbalance began to grow markedly, increasing at the rate of 5.25 percent per year. See Chart One, attached.

13 See Notice ¶ 12 & n.15 (describing how the growth of call-back resulted in a serious traffic imbalance between the United States and Hong Kong). As demonstrated in Part IV, infra, call-back has had a similarly adverse effect on the balance of traffic between the United States and Argentina.

14 See Via USA, Ltd., et al. 9 FCC Rcd 2288 (1994), on recon., 10 FCC Rcd 9540 (1995) ("Via USA Recon Order").

bypassed the United States is converted into a call from the originating country to the United States, and a second call from the United States to the terminating country, thereby generating an accounting rate out-payment. The FCC was asked to rule on the legality of this practice in 1995, but has yet to issue a decision.[15] To the extent that call-back and call re-origination are exacerbating the U.S. settlements deficit, the FCC has no one to blame but itself.

The FCC also has contributed to the settlements deficit by refusing to approve accounting rate agreements -- such as those Telintar has entered into with MCI, Sprint and WorldCom -- that would reduce accounting rates. Instead, the agency has supported actions by U.S. carriers -- such as those of AT&T in Argentina -- that refuse to enter into new accounting rate agreements on the same non-discriminatory terms as their competitors.[16]

The FCC must recognize that the size of the settlements deficit is significantly offset by two sources of revenue. First, call-back customers outside the United States make significant payments to call-back operators within the United States. Second, the growth of call re-origination has generated significant new revenues for U.S. carriers. The FCC cannot validly assert that it must take action because of the growth of the settlements deficit without considering these important off-setting revenues.

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15 See MCI Telecommunications Corp., "Petition for Declaratory Ruling," Sprint Communications Co., L.P. -- Reorganization of International Telecommunications Traffic (filed Jan. 27, 1995).

16 The Telintar-AT&T dispute is discussed further in Part IV, infra.

The FCC also must bear in mind that the current accounting rate regime provides significant countervailing benefits that help to offset any adverse effect that the settlements deficit may be having on the United States. The Notice acknowledges that revenues derived from international settlements payments "benefits . . . the economies of the United States and other countries by providing the telecommunications infrastructure necessary to support international commerce and trade."[17] While this is correct, the benefits are far less diffuse than the FCC suggests. The law of "network effects" teaches that improvements to foreign telecommunications infrastructure directly increase the value of each U.S. user's telephone connection by increasing number and quality of the connections that the user is able to make.

Finally, the FCC must recognize that a significant portion of the revenue that non-U.S. carriers receive from their U.S. correspondents flows directly back to the United States as a result of payments by these carriers to their U.S. correspondents for equipment purchases, technical assistance, and other products. Efforts to force excessive reduction in accounting rates in an unreasonable period of time would place these benefits in jeopardy.

B. Lower Accounting Rates Can Only Come Through Bilateral Negotiations

As noted above, Telintar shares the FCC's desire to move towards more cost-oriented accounting rates, and has taken concrete actions to do so. However, the FCC must understand that foreign carriers -- including Telintar -- are not subject to the FCC's jurisdiction, and will not permit the FCC to dictate to them. The only way in which accounting rates can be

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[17] Notice ¶ 59.

reduced is through bilateral negotiations. The FCC has every reason to believe that continued negotiations will result in achieving continued reductions in accounting rates. As the Notice recognizes, between 1992 and 1996, bilateral negotiations resulted in a 30 percent decrease in accounting rates paid by U.S. carriers.[18]

Telintar does not dispute the FCC's authority to establish accounting rate "goals" for U.S. carriers to pursue in their negotiations. The FCC may even have the authority to "prescribe" the accounting rate that a U.S. carrier may agree to -- although it is difficult to see how imposing a straitjacket on the ability of U.S. carriers to reach mutually acceptable agreements with their foreign correspondents would facilitate negotiations. What the FCC may not do is to establish the rates that foreign carriers can charge for their services.

The FCC has taken the position that its proposal would not exceed its jurisdiction because it merely seeks to regulate the practices of U.S. carriers.[19] This is little more than sophistry. U.S. carriers and their foreign correspondents have entered into accounting rate agreements, which give foreign carriers the right to receive payments from their U.S. correspondents at specified rates. The FCC has proposed that, in certain circumstances, it deprive foreign carriers of the ability to obtain those payments. There is simply no way in which the FCC could invalidate the terms of a bilateral accounting rate agreement without exercising jurisdiction over both the U.S. carrier and its foreign correspondent. The FCC, however, is utterly without

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[18] See id. at ¶ 26. As described in Part IV, infra, the accounting rate between Argentina and the United States has declined during this period. Telintar, moreover, has committed to significant further reductions.

[19] See id. at ¶ 19.

authority over foreign carriers and, therefore, is powerless to abrogate their rights.[20] As NTIA observed in a prior FCC proceeding, "[f]oreign governments . . . maintain independent sovereign authority over the foreign end of a call. . . . [T]he Commission cannot compel foreign entities to accept accounting rates prescribed by the Commission for U.S. carriers . . . ."[21]

In the present proceeding, the FCC has proposed to require that the accounting rate that foreign carriers may charge U.S. correspondents be based on total service long-run incremental costs ("TSLRIC"). Whatever the merits of this methodology may be, the fact is that telephone rates in the United States are not -- and have never been -- based on incremental costs. To the contrary, long-distance and business rates in the United States always have been set well above cost in order to ensure that carriers recover their embedded costs and generate sufficient subsidies to promote universal service. Indeed, even the new Telecommunications Act contains provisions designed to subsidize the rates paid by certain users. There is no reason why foreign carriers' should not have the right to use revenue from international calls in precisely the way in which U.S. carriers have long done so.

The FCC's attempt to estimate TSLRIC costs, moreover, is deeply flawed. In the absence of any data regarding foreign carriers' actual costs, the FCC proposes to use two "alternative methods" to set benchmark ranges. At the low end of the range, the agency proposes

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20 Cf. Regents of the University System of Georgia v. Carroll, 338 U.S. 586, 600 (1950) ("Carroll") (While the FCC may impose conditions on entities subject to its jurisdiction, "the Communications Act does not give authority to the Commission to determine the validity of contracts between [entities subject to its jurisdiction] and others.").

21 Comments of the National Telecommunications and Information Administration, Regulation of International Accounting Rates, CC Docket No. 90-337 at 17 (filed Oct. 12, 1990).

to rely on an estimate provided by AT&T regarding its costs to terminate inbound international traffic. At the high end of the range, the FCC proposes to average the component prices listed in tariffs from countries at similar levels of economic development, based on figures provided by the World Bank.

AT&T's estimate of its domestic cost structure plainly has no relevance to the costs incurred by carriers in other countries. Similarly, reliance on foreign country tariffs for the price of the "components" of international service also is inappropriate. As is the case in the United States, tariffs in many countries do not reflect the actual cost structure of the underlying service. Some services may be priced above cost to generate subsidies, while others may be priced below cost to promote widespread use. The FCC has no basis on which to assume that these tariffs provide a reliable indication of the cost of terminating international calls in any given country.

No matter what methodology the FCC uses to develop its benchmarks, the agency cannot lawfully force carriers outside the United States to comply with its policy-demands by ordering U.S. carriers to breach the operating and accounting rate agreements that they have entered into with their foreign correspondents. As we demonstrate below, such an action would violate both U.S. and international law. Such an approach also would be unwise as a matter of policy. Carriers around the world must be able to rely on the agreements that they have made with their U.S. correspondents. These carriers simply will not agree to significant further accounting rate reductions if they are subject to threats that -- at any moment -- the U.S. carriers will breach their agreements and unilaterally impose an even lower accounting rate. To the contrary, the FCC must anticipate that, if U.S. carriers do not scrupulously comply with their contractual obligations, their foreign correspondents will exercise the full measure of their contractual remedies.

The course that the FCC is embarking on could lead to serious disruptions in the operation of the international telecommunications system. Given the serious legal infirmities in the agency's approach, the proven record of success from negotiations in recent years, the willingness of most foreign carriers to continue meaningful negotiations towards further reduction, and the grave consequences that could result, the FCC's most prudent course is to reject the radical proposals contained in the Notice.

Instead of unlawful unilateral action, the FCC should participate in international efforts -- under the auspices of the International Telecommunication Union -- that will lead to reform of the international settlements process. Pending such negotiations, the FCC should direct U.S. carriers to continue to participate in bilateral accounting rate negotiations, while complying with the terms of their existing agreements.

II. THE FCC'S PROPOSAL WOULD VIOLATE INTERNATIONAL LAW

The Notice proposes a radical departure from the existing international regulatory regime. In effect, the FCC seeks to unilaterally establish international accounting rates. If a non-U.S. carrier refuses to accept the FCC-specified rate, the agency would direct U.S. carriers to breach the terms of their existing accounting rate agreements and settle traffic with that carrier at the FCC-specified rate. As we demonstrate below, such an approach would violate the binding provisions of the ITU Treaty, the principles of Most Favored Nation and National Treatment, and the United States' bilateral treaty obligations.

A. The FCC's Proposal Would Violate the Binding Obligations Contained in the ITU Regulations

The proposals contained in the Notice would violate the binding Regulations of the International Telecommunication Union ("ITU").[22] These regulations expressly recognize "the sovereign right of each country to regulate its telecommunications."[23] Although the Notice claims that the FCC supports "multilateral consensus" on accounting rate reform and the efforts of international organizations such as the ITU,[24] its proposal reveals a willful disregard for the sovereignty of other nations. The ITU has already voiced its concern regarding the FCC proposal. As one ITU official recently explained:

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22 See International Telecommunication Convention, Final Protocol (Nairobi, 1982) ("Nairobi ITU Convention"); Via USA Recon Order, 10 FCC Rcd at 9550 n.44 (1995) ("[T]he 1982 Nairobi Convention . . . binds the United States as a matter of both international and domestic law."). Pursuant to the Nairobi ITU Convention, the U.S. Government is bound by the Regulations promulgated by the ITU. Nairobi ITU Convention, Art. 42(1)-(2) & Art. 44; see also Via USA Recon Order at 9551 & n.49 ("The United States, as a party to the 1982 Nairobi Convention and to the [ITU Regulations], is subject to the obligations imposed by these instruments."). ITU members are also bound to "such partial revisions" to the Regulations as may be adopted from time to time. See Nairobi ITU Convention, Art. 43.

23 International Telecommunications Union, Final Acts of the World Administrative Telegraph and Telephone Conference, Preamble (Melbourne 1988)("ITU Regulations"); Nairobi ITU Convention, Preamble; see also Final Acts of the Plenipotentiary Conference of the International Telecommunication Union (Kyoto, 1994), Resolution 1, Strategic Plan for the Union, 1995-1999 (The ITU "recogniz[es] the need to facilitate smooth development of telecommunications for maximum social and economic benefit in the future by: . . . developing a common understanding of the regulation of telecommunications at the national level, while preserving each State's sovereign right to regulate its telecommunications.") (emphasis added).

24 Notice ¶ 17.

> The FCC notion of the benchmark rate is: "We've calculated what accounting rates ought to be and now we're going to impose them on the rest of the world." The success of this approach depends on how big a stick the United States has.[25]

The FCC's efforts to replace bilaterally adopted accounting rate agreements with rates imposed by the United States would directly violate at least two specific regulations adopted by the ITU.

Article 1.5. Article 1.5 of the ITU Regulations states that "the provision . . . of international telecommunications services in each relation[26] is pursuant to mutual agreement between administrations or recognized private operating agencies ("RPOAs")]."[27] Carriers throughout the world currently have effective accounting rate agreements with their U.S. correspondents, each of which constitutes an RPOA within the meaning of the ITU Regulations.[28] These agreements specify the rates at which settlements payments are to be made. The FCC's

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25 John Blau, ITU and U.S. Collide Over Accounting, Communications Week International, Dec. 16, 1996, at 1.

26 Article 2.7 of the ITU Regulations defines a "relation" as an "[e]xchange of traffic between two terminal countries, always referring to a specific service." ITU Regulations, Art. § 2.7.

27 Id. Art. § 1.5 (emphasis added). The term "RPOA" is included in brackets because the ITU documents use the phrase "or RPOA" as a footnote to every use of the term "administration."

28 An "RPOA" is defined as "[a]ny private operating agency . . . which operates a public correspondence . . . and upon which the obligations . . . of this Convention are imposed by the Member . . . which has authorized this operating agency to establish and operate a telecommunications service on its territory." Nairobi ITU Convention at Annex 2. An operating agency is defined as "[a]ny individual or company or corporation . . . which operates a telecommunications installation intended for an international telecommunication service." Id.

proposals would violate Article 1.5 by requiring U.S. carriers to settle traffic with foreign carriers at accounting rates specified by the FCC, rather than by the rates that are the result of "mutual agreement" between the corresponding parties.

Article 6.2.1. The proposals contained in the Notice also would violate Article 6.2.1 of the ITU Regulations, which directly governs revisions to accounting rate agreements. This provision states that, "[f]or each applicable service in a given relation, administrations [or RPOAs] shall by mutual agreement establish and revise accounting rates to be applied between them . . . ."[29] By definition, requiring U.S. carriers to unilaterally breach the terms of their accounting rate agreements and settle traffic at rates unilaterally imposed by the FCC violates the requirement that any such changes be made "by mutual agreement."

Article 31 of Convention/Article 9 of Regulations. Contrary to the suggestion in the Notice,[30] neither Article 31 of the 1982 Nairobi ITU Convention (Article 42 under the 1992 Geneva ITU Convention), nor Article 9 of the ITU Regulations, provides a basis for the FCC to replace the system of bilateral agreements, which are the cornerstone of the international telecommunications system, with a regime in which the FCC establishes accounting rates and directs U.S. carriers to breach the terms of their operating agreements.

Article 31 merely allows ITU Member Countries to authorize carriers subject to their jurisdiction to "make special arrangements on telecommunications matters which do not

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[29] ITU Regulations, Art. § 6.2.1 (emphasis added).

[30] Notice ¶ 6 n.5.

concern Members in general." Similarly, Section 9.1 of the ITU Regulations does nothing more than to permit ITU Member Countries to authorize carriers subject to their jurisdiction to enter into "mutual arrangements" with carriers in other countries "for the establishment and use of specialized telecommunications networks . . . in order to meet specialized telecommunications needs." These provisions have nothing to do with accounting rates. They were adopted to remove non-tariff trade barriers that jeopardized the development of private telecommunications and data networks.

B. Recommendation D.140 Does Not Provide a Basis for the FCC's Proposed Actions

The FCC repeatedly relies on ITU Recommendation D.140 -- which states that "accounting rates for international telephone service should be cost-orientated" -- to justify its proposals.[31] Recommendation D.140, however, is not a legally binding requirement. Rather, as Article 1.4 of the ITU Regulations makes clear, ITU Recommendations do not have "the same legal status as the Regulations."[32] Indeed, the United States has expressly disavowed affording CCITT (now ITU-T) Recommendations any binding effect.[33]

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31 See id. at ¶¶ 1 n.1, 15, 35, 58, 88.

32 ITU Regulations, Art. § 1.4.

33 Id., Final Protocol, Reservation No. 39(II)(a). Article 21 of the Vienna Convention on the Law of Treaties expressly states that a reservation taken by one contracting party to certain treaty provisions "modifies these provisions to the same extent for that other party in its relations with the reserving State." Vienna Convention on the Law of Treaties, art. 21(1)(b), reprinted in 8 I.L.M. 679, 688 (1969). Thus, because the United States deems the ITU Recommendations voluntary, they are voluntary for other countries vis-a-vis their relations with the United States.

The Notice, moreover, fundamentally distorts Recommendation D.140. As an initial matter, the FCC has relied on the out-of-date 1992 version of the Recommendation. As a result, it fails to acknowledge Annex C, which was adopted in 1995.[34] Annex C states that Member Countries are to use "bilateral negotiations to . . . revise accounting rates."[35] The Annex specifies detailed procedures for the conduct of these negotiations, and states that if the parties cannot agree on a rate, the appropriate response is not unilateral action, but continued negotiations. If agreement on an accounting rate reduction is reached, Recommendation D.140 encourages the parties to agree to a schedule for gradually reducing the accounting rate in stages until the full reduction is implemented, which normally should occur within five years of reaching agreement.

More significantly, the Notice ignores the fact that Recommendation D.140 does not endorse the incremental cost approach proposed by the FCC. Rather, the Recommendation expressly acknowledges the importance of considering a variety of factors -- including the level of network development -- in establishing accounting rates that are "orientated" towards cost. Recommendation D.140 also recognizes that countries at different levels of economic development are likely to have different cost structures. As a result, fidelity to this Recommendation may require adoption of asymmetric accounting rates -- in which a carrier from a more developed country like the United States would be required to pay a higher rate to terminate traffic in a less

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[34] ITU-T Recommendation D.140, "Accounting Rate Principles for International Telephone Services" (approved Sep. 28, 1995) ("Recommendation D.140").

[35] Recommendation D.140, Annex C.

developed country, while the correspondent from the less developed country would be able to terminate the return traffic at a lower rate.

The FCC's reliance on various documents issued by the Organization for Economic Cooperation and Development ("OECD") is similarly misplaced.[36] The OECD consists of 29 market-oriented industrial nations, none of which is from Central or South America. Its conclusions have limited relevance for -- and certainly no binding effect on -- non-member countries, such as Argentina.

Similarly, ITU Recommendation D.300R,[37] by its terms, is limited to accounting arrangements in effect within Europe and the Mediterranean Basin. Simply characterizing some members of this region as "low or lower middle income countries"[38] does not provide any reasoned basis for concluding that data from these countries is suitable for analyzing the costs faced by countries throughout the world.

C. The FCC's Proposals Would Violate the GBT "Standstill" Agreement

The FCC's proposal to unilaterally lower accounting rates violates the "standstill" provision of the Decision on Negotiations on Basic Telecommunications ("GBT Decision").[39]

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36 See Notice ¶¶ 15-17 & 56.

37 Id. at ¶ 33 n.41, ¶ 37 nn.49-50.

38 Id. at ¶ 37 n.49.

39 See Agreement Establishing the World Trade Organization, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Decision on Negotiations on Basic Telecommunications ¶ 7, reprinted in 33 I.L.M. 1125, 1258 (1994) ("Final Act").

This provision precludes the United States from "apply[ing] any measure affecting trade in basic telecommunications in such a manner as would improve its negotiating position and leverage" in the GBT negotiations.[40]

The United States has made clear that it intends to use the GBT Negotiations to seek lower international accounting rates. Indeed, accounting rate reductions are a cornerstone of the United States' offers.[41] The FCC's threat in the Notice to unilaterally impose lower accounting rates plainly is designed to improve its negotiating position in the GBT with respect to international accounting rates.[42] As FCC Chairman Reed Hundt acknowledged, the FCC believes that "it will be easier to reach an agreement at the WTO if the world understands that the United States is creating a new set of rules for its international traffic and accounting rate

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40 Id. This provision remains in effect. The entire GBT Decision was incorporated into the GBT Extension Agreement of April 30, 1996. See World Trade Organization, Decision on Commitments in Basic Telecommunications, S/L/19, 96-1746 (Apr. 30, 1996); Fourth Protocol to the General Agreement on Trade in Services, S/L/20, 96-1750 (Apr. 30, 1996).

41 See U.S. Conditional Offer to the Group on Basic Telecommunications at 6 (Nov. 13, 1996) (proposing that interconnection to a Member Country's domestic network be at "cost-oriented rates that are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled"); U.S. Draft Offer on Basic Telecommunications at 5 (Feb. 26, 1996) (proposing that interconnection to a Member Country's domestic network for international service be "at rates that are . . . non-discriminatory and cost-based" and that carriers in the Member Country be required to "justify any international accounting rate that differs significantly from domestic interconnection rates.").

42 The Commission previously has recognized that actions that impose new burdens on non-U.S. carriers may constitute a violation of the "standstill" provision. See Market Entry and Regulation of Foreign-affiliated Entities, 11 FCC Rcd 3873, 3965 (1995).

payments."[43] The FCC's action, therefore, violates the commitment made by the U.S. Government to honor a regulatory "standstill" during the GBT negotiation process.

D. The FCC's Proposals Are Inconsistent With the Principles of Most Favored Nation and National Treatment

The FCC recognizes that any GBT Agreement is likely to include Most Favored Nation ("MFN") and National Treatment obligations.[44] Yet, the FCC does not even attempt to explain how the proposals in the Notice could be consistent with these obligations. As demonstrated below, the Commission's proposals would violate both principles.

MFN. The MFN principle precludes the FCC from discriminating among carriers from different countries. For example, the MFN provision of the General Agreement on Trade in Services ("GATS") states, in part:

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43 Speech of Reed Hundt before the Institute for International Economics at 10 (Oct. 23, 1996) ("Hundt Speech"). The Chairman further indicated that if agreement in the GBT talks was not reached, the Commission would take other measures to reduce accounting rates:

> [We] insist on cost based connections between two countries. Competition can normally get us to this end. But when countries don't make competitive commitments at the WTO we may need other initiatives to move these connections toward cost.

Id. at 7 (emphasis added).

44 See Notice ¶¶ 30, 86.